

SEP 22 1976

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SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-1596

ANTHONY GRUNDY and
CARL WEAVER - - - - - Petitioners

versus

MANCHESTER INSURANCE & INDEMNITY
COMPANY - - - - - Respondent

On Petition For Writ of Certiorari to the Supreme Court
of Kentucky

BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

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TABLE OF CONTENTS

	PAGE
Table of Authorities.	ii-iii
Interest of the Amicus Curiae.	1- 2
Reasons for Granting the Writ—The Petition for Certiorari Should Be Granted for the Reason That Denial of Trial by Jury in a Particular Civil Case, on the Ground That the Issues are Complicated and Beyond the Capabilities of Laymen to Adequately Resolve, Is Repugnant to the Constitution of the United States.	3-13
Conclusion.	14
Certificate of Service.	15

TABLE OF AUTHORITIES

iii

Cases:

	PAGE
Beacon Theaters, Inc. v. Westover, 359 U. S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959).....	7
Blackmer v. United States, 284 U. S. 421, 52 S. Ct. 252, 76 L. Ed. 375 (1932).....	5
Brandenburg v. Burns, Ky., 451 S. W. 2d 413 (1970).....	13
Capital Traction Co. v. Hof, 174 U. S. 13, 19 S. Ct. 585, 43 L. Ed. 873 (1899).....	8
Davis v. Rockton & Rion R. R., 65 F. Supp. 67 (W.D. S. Car. 1946).....	11
Enderman v. Ashby, 2 Ky. 65, Sneed 53 (1801)....	9
Gullion v. Boulware, 2 Ky. 89, Sneed 76 (1801)....	9
Hebert v. Louisiana, 272 U. S. 312, 47 S. Ct. 103, 71 L. Ed. 270, 48 ALR 1102 (1926).....	6
Irwin v. City of Manhattan Beach, 415 P. 2d 769, 51 Cal. Rptr. 881 (1966).....	11
Maxwell v. Dow, 176 U. S. 581, 20 S. Ct. 448, 44 L. Ed. 597 (1900).....	4
Mihans v. Municipal Court, 87 Cal. Rptr. 17 (1970) .	11
Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935).....	6
Moore v. Dempsey, 261 U. S. 86, 43 S. Ct. 265, 67 L. Ed. 543 (1923).....	6
Santa Clara County v. Southern Pac. R. R., 118 U. S. 394, 6 S. Ct. 1132, 30 L. Ed. 118 (1886).....	9
Scott v. McNeal, 154 U. S. 34, 14 S. Ct. 1108, 38 L. Ed. 896 (1894).....	5
Shelley v. Kraemer, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, 3 ALR 2d 441 (1948).....	10
Stidger v. Rogers, 2 Ky. 64, Sneed 52 (1801).....	8
Terrell v. Western Casualty & Surety Co., Ky., 427 S. W. 2d 825 (1968).....	9
In re Trummer, 388 P. 2d 177, 36 Cal. Rptr. 281 (1964).....	12
Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908).....	5

Constitutional Provisions:

	PAGE
Constitution of the United States of America:	
Amendment V.	4
Amendment VII.	6
Amendment XIV.	2, 4, 5, 6, 8, 9, 12, 14
Kentucky Constitution:	
Section 7.	8

Miscellaneous Authorities:

16 Am. Jur. 2d, Constitutional Law, §549.....	7- 8
16 Am. Jur. 2d, Constitutional Law, §550.....	10
Federal Rules of Civil Procedure, Rule 38.....	6

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v.

MANCHESTER INSURANCE & INDEMNITY
COMPANY - - - - - *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

**BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS
OF AMERICA AS AMICUS CURIAE IN SUPPORT
OF PETITION FOR CERTIORARI**

May it please the Court:

INTEREST OF THE AMICUS CURIAE

The Association of Trial Lawyers of America, as representative of its membership consisting of practicing trial attorneys throughout the United States, respectfully submits this Brief as Amicus Curiae in support of the Petition for Writ of Certiorari and urges the Court to grant the petition.

This petition involves the decision of the Supreme Court of the State of Kentucky to deny the right of trial by jury in an action involving alleged breach of an insurance contract by an insurance company, where the right of trial by jury has historically been guaranteed by the Kentucky Constitution. The Brief for the Association of Trial Lawyers of America is addressed to the fact that denial of a trial by jury under these circumstances is contrary to the guarantees enunciated in the United States Constitution, Fourteenth Amendment, guaranteeing due process and equal protection of the laws.

The Association of Trial Lawyers of America, through its membership of over 27,000 trial attorneys in the United States, including the State of Kentucky, seeks to represent the interest of the general public in preserving the right of trial by jury where it has been guaranteed, both by the Kentucky Constitution and the Constitution of the United States of America. The issues here concern not only all practicing attorneys, but are matters of national importance in that any diminution or infringement of constitutional rights, wherever they may occur, affect jurisprudence nationally.

REASON FOR GRANTING THE WRIT

The Petition for Certiorari Should Be Granted for the Reason that Denial of Trial by Jury in a Particular Civil Case, on the Ground that the Issues are Complicated and Beyond the Capabilities of Laymen to Adequately Resolve, is Repugnant to the Constitution of the United States.

The Opinion of the Court of Appeals of Kentucky, now the Supreme Court of Kentucky, holds that in actions against an insurance company for breach of contract for bad faith in failing to settle within the policy limits, the test for liability should be whether the insurer's failure to settle exposed the insured to an unreasonable risk of having a judgment rendered against him in excess of the policy limits. The Court goes on to state that

"A jury is just not equipped to evaluate the probable chances of recovery in a given case; nor is it equipped to properly weigh and evaluate this factor together with the other factors enumerated above. The issue of 'bad faith' should be decided by the trial court. Only the trial court has the training and experience to properly apply these factors to a set of facts."

Thus, the highest Court in the State of Kentucky has mandated that the right to a trial by jury in a particular type of civil action shall be denied solely on the basis of the complexity of the issues and the difficulty of applying a particular legal test to a particular set of facts. The Court thereby has abrogated the right

of all litigants in Kentucky similarly situated to the long-established right to trial by jury in civil actions at law, and has trampled on the basic, fundamental rights guaranteed citizens by the Constitution of the United States.

In effect, the Supreme Court of Kentucky has denied the right to trial by jury to a sub-class of litigants within a larger category consisting of all parties to legal actions for breach of contract, without a rational or valid basis for distinguishing such an action for damages from any other such action at law. The separation of insurance company defendants, along with plaintiffs claiming bad faith for failure to settle within policy limits, from other such litigants in contract actions bears absolutely no reasonable relationship to the object of the lawsuit, namely, the recovery of damages. Such a holding violates the guarantees of due process of law and equal protection of the laws secured to all citizens of the United States by the Fifth and Fourteenth Amendments to the United States Constitution, which rights are fundamental and basic to our system of justice.

The Fifth Amendment provides in part as follows:

“No person shall be . . . deprived of life, liberty, or property without due process of law . . .”

It has been held that due process of law is that process due according to the law of the land, and is regulated in each state according to the law of that state. *Maxwell v. Dow*, 176 U. S. 581, 20 S. Ct. 448, 44 L. Ed. 597 (1900).

The privileges and immunities of the Bill of Rights in their origin were effective only against the Federal Government; however, the Fourteenth Amendment by its adoption made these guarantees equally effective against the individual states:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

The authors of this Amendment have thus extended the application of the privileges guaranteed in the Bill of Rights to the states in the firm belief that neither justice nor liberty would exist without them. *Twining v. New Jersey*, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908). This is so not because those rights are enumerated in the first eight Amendments, but rather because those rights are of such a fundamental nature that they are included in the concept of due process of law, and indeed are necessary elements of liberty itself.

Such a fundamental right is the idea that penalties and forfeitures shall follow only after trial. *Scott v. McNeal*, 154 U. S. 34, 14 S. Ct. 1108, 38 L. Ed. 896 (1894); *Blackmer v. United States*, 284 U. S. 421, 52 S. Ct. 252, 76 L. Ed. 375 (1932). Furthermore, the

trial must be a real one and not a sham or pretense. *Moore v. Dempsey*, 261 U. S. 86, 43 S. Ct. 265, 67 L. Ed. 543 (1923); *Mooney v. Holohan*, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935).

This expansion of the concept of liberty through application of the Fourteenth Amendment has logically followed the ancient recognition that freedom is something more than mere exemption from physical restraint, and that in the field of substantive rights, neither judicial nor legislative judgment is above these basic concepts. Thus, courts have not hesitated to strike down those laws and procedures which violate those fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions. *Hebert v. Louisiana*, 272 U. S. 312, 47 S. Ct. 103, 71 L. Ed. 270, 48 ALR 1102 (1926).

The right to trial by jury is safeguarded in the Federal courts through the Seventh Amendment, which establishes the historical test that if in 1791, the date of adoption of the Amendment, a party were entitled to a jury trial, then this right is preserved and generally accorded to a litigant in a similar suit today. Of course, at common law a jury trial was generally available in actions at law, while suits in equity were determined by the court sitting without a jury, and the distinction was based primarily on the form of relief requested, thereby enabling the plaintiff to exercise control to a large degree over the right to jury trial. Rule 38 of the Federal Rules of Civil Procedure, has retained the Seventh Amendment historical test for the right to jury trial and this law-equity distinction

has remained viable as to mode of trial in Federal courts.

Difficulties have arisen, however, when cases were brought in Federal courts where both legal and equitable issues have been presented, but concerning which a common issue has been presented, which was determinative of both forms of relief and which either law or equity could try. In such situations, the Federal courts have developed a consuming bias in favor of trial by jury over trial before the judge sitting without a jury. Thus, in *Beacon Theaters, Inc. v. Westover*, 359 U. S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959), in which suit for an injunction was brought and which resulted in a counterclaim for damages (and a demand for a jury trial), and in which the issue of violation of antitrust laws was central to both claims, the Supreme Court held that the trial court erred in ordering that the equitable issues be tried first without a jury. The Court pointed out that the trial of the equitable claim would foreclose subsequent relitigation of the same issue before a jury, and that this was the equivalent of a denial of the counterclaimant's right to trial by jury. The Court reasoned that since the right to trial by jury is constitutionally protected, while the non-jury trial is not, therefore the discretion of the courts must be exercised to preserve the right to jury trial.

Of course, each state may regulate the procedure of its own courts in accordance with its own conception of policy and fairness, provided the procedure is not unreasonable or arbitrary, or violates some fundamental principle of justice. 16 Am. Jur. 2d Constitu-

tional Law §549. In other words, the procedures adopted by a given state in the conduct of its civil litigation remain subject to the principles of the Fourteenth Amendment. Section 7 of the Constitution of the Commonwealth of Kentucky sets forth the procedure adopted by this state with regard to the mode of trial:

“§7. Trial by jury inviolate.—The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution.”

Such a trial requires

“... a trial by a jury of 12 men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion. Yet there are unequivocal statements of it to be found in the books.”
Capital Traction Co. v. Hof, 174 U. S. 13, 19 S. Ct. 585, 43 L. Ed. 873 (1899).

In the Commonwealth of Kentucky, actions for damages for breach of contract have always been cognizable at law, and those laws which deprive a litigant of his right to trial by jury have consistently been ruled violative of Section 7 of the Kentucky Constitution. *Stidger v. Rogers*, 2 Ky. 64, Sneed 52 (1801);

Enderman v. Ashby, 2 Ky. 65, Sneed 53 (1801); *Gullion v. Boulware*, 2 Ky. 89, Sneed 76 (1801). There is no question that this present action is one of contract and the Kentucky Court of Appeals (now Supreme Court) has so determined. *Terrell v. Western Casualty & Surety Co., Ky.*, 427 S. W. 2d 825, 827 (1968).

The Kentucky Supreme Court has now sought to eliminate jury trials in a particular type of contract action against insurance companies; this decision violates not only the clear language of the Kentucky Constitution as set forth above, but violates the guarantees of the Fourteenth Amendment to the Constitution of the United States. As we have stated, through the supremacy clause, all state action is subject to the rights and privileges guaranteed and secured to citizens by the Fourteenth Amendment:

“... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Not only natural-born citizens, but also corporations are “persons” within the meaning of this Amendment. *Santa Clara County v. Southern Pac. R.R.*, 118 U. S. 394, 6 S. Ct. 1132, 30 L. Ed. 118 (1886).

Judicial action in private disputes is a form of state action requiring application of the Fourteenth Amendment prohibiting denial of equal protection or due

process to its citizens. *Shelley v. Kraemer*, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, 3 ALR 2d 441 (1948).

The guarantees of equal protection require that all litigants within a class be treated alike. Although a rule of law might work a hardship in certain instances without violating these guarantees, *the law must operate without any discrimination and in a like manner against all persons of a class*. 16 Am. Jur. 2d Constitutional Law §550. Here, plaintiffs suing insurance companies for breach of contract are treated differently under the Kentucky Court's holding from plaintiffs suing individuals or other corporations. Similarly, insurance company defendants are treated differently from other corporate or individual defendants in similar litigation. Yet all of these parties fall within the same class of litigants, namely, those involved in actions at law for breach of contract. Due process of law is denied when any particular person of a class is singled out for the imposition of restraint or burdens not imposed upon, and to be borne by, all of the class, unless there are valid distinctions which differentiate the particular individuals of the class to be affected from the remainder of that class. 16 Am. Jur. 2d Constitutional Law §550. As we shall see, there is no valid distinction for classifying insurers separately from these other litigants, and in so doing the Supreme Court of Kentucky violates this fundamental guarantee of equal treatment for all parties similarly situated.

Thus it has been held that, where a general statute of limitations on actions under a statute was six years,

but a special enactment required actions under a Federal statute be brought in state court within one year from date of accrual, the statute denied equal protection of the laws since it arbitrarily discriminated against claimants under Federal statutes. *Dayis v. Rockton & Rion R.R.*, 65 F. Supp. 67 (W. D. S. Car. 1946). Similarly, the California Supreme Court has held that giving a non-resident corporate taxpayer the right to maintain suit to enjoin expenditure of municipal funds while denying that right to non-resident taxpayers who are natural-born persons would violate the Fourteenth Amendment guarantees. *Irwin v. City of Manhattan Beach*, 415 P. 2d 769, 51 Cal. Aprt. 881 (1966). In addition, a statute giving a landlord the right to immediate possession if the tenant were insolvent, but making no such provision for ejectment of a solvent tenant, constituted discrimination toward the insolvent tenant and denied him equal protection of the laws, since the distinction between the two classes of tenants bore no reasonable relationship to the object of the unlawful detainer action, namely, possession of the premises. *Mihans v. Municipal Court*, 87 Cal. Rptr. 17 (1970). Similarly where a narcotics addict who was denied a jury trial on the issue of addiction in civil commitment proceedings, while a jury trial on the same issue was provided for persons committed to the same narcotics program under a different statute or for a person had voluntarily committed himself to the rehabilitation program, it was held that the denial of a jury trial to a certain category of narcotics users violated the equal protection clause

of the United States Constitution. In re Trummer, 388 P. 2d 177, 36 Cal. Rptr. 281 (1964).

The concept basic to each of the above decisions is clear: denying a right to members of a group within a larger class of litigants, while preserving that right to the remainder of the class, constitutes unlawful discrimination against that group and violates the guarantees of the Fourteenth Amendment providing for equal protection of the law. The analogy to the present case is obvious: a plaintiff suing for damages for breach of contract cannot constitutionally be treated any differently from any other plaintiff litigating on the same theory, simply because the defendant is an insurer rather than an individual or other corporation. By the same token, insurers cannot constitutionally be singled out from other such defendants for different legal proceedings.

The Kentucky Supreme Court has sought to justify the denial of a jury trial in an action for bad faith failure to settle, on the ground that complicated issues are presented which a trial judge is better equipped to evaluate and decide. This analysis is questionable at best. Certainly the jury system is not a perfect solution for the decision of controversies; nevertheless, the framers of the Kentucky Constitution felt that the jury trial was the best system of the available choices when they wrote:

"The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate . . ."

The holding of the Kentucky Supreme Court eviscerates this section with the stroke of a pen, with no regard for the separate functions of the legislature and the judiciary or for the voice of the people in instituting constitutional change.

Furthermore, the then Kentucky Court of Appeals in *Brandenburg v. Burns*, Ky., 451 S. W. 2d 413 (1970) held that in a contract action, where complicated accounts were involved, the Circuit Court was not entitled to try the issues sitting without a jury merely on the ground that a jury could not intelligently reach a decision. The Court specifically held that the fact that complex issues are involved does not convert a legal issue into an equitable one. Since this is the sole basis of the Court's distinction between the present action for bad faith refusal to settle, and other contract actions, this ground must fail for want of a rational distinction between the present action and other actions for breach of contract where damages are sought as the remedy; and with that ground, so also must fail the decision of the Kentucky Supreme Court that trial must be had without a jury. To uphold the decision of the Kentucky Court would be to condone arbitrary discrimination against a sub-class of litigants, which is patently contrary to the principle of equal application of the laws which is at the roots of our system of justice.

CONCLUSION

Both the Constitution of the United States and the Kentucky Constitution, as well as the common law of Kentucky, require that trial be had before a jury in actions at law. The courts of Kentucky and the Federal Courts have consistently ruled in favor of this right as a sacred guarantee secured to the people by both the State and Federal Constitutions. To now single out a particular legal action for denial of jury trial, where the grounds for distinguishing that action from others of the same class, patently have no reasonable relationship to the object of the action, namely, recovery of damages, constitutes arbitrary discrimination prohibited by the Fourteenth Amendment of the U. S. Constitution which safeguards equal protection of the laws. For the foregoing reasons, it is respectfully urged that this Court grant the petition for writ of certiorari to the Supreme Court of Kentucky.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that three copies of this Brief of Amicus Curiae have been served by mailing, postage prepaid, to Hon. James Levin, Attorney for Respondent, 805 Bank of Louisville Building, Louisville, Kentucky 40202, and to Honorable Joe G. Leibson, Attorney for Petitioners, 515 Marion E. Taylor Building, Louisville, Kentucky 40202, this September 20, 1976.


Counsel for Amicus Curiae